

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

FISHER INDUSTRIES, FISHER SAND
AND GRAVEL CO., AND TGR
CONSTRUCTION, INC., ET. AL.,

Defendants.

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CASE NO. 7:19-CV-403

**UNITED STATES OF AMERICA’S OPPOSED MOTION FOR LEAVE OF COURT TO
FILE SECOND AMENDED COMPLAINT FOR INJUNCTIVE RELIEF**

Plaintiff, United States of America (hereinafter “United States”), through the undersigned Assistant United States Attorney, respectfully requests leave of Court pursuant to Rule 15(a)(2) F.R.C.P. to file its Second Amended Complaint for Injunctive Relief.¹ In support, the United States shows the following:

BACKGROUND

1. The United States filed its Complaint for Injunctive Relief (Docket No. 1) as well as Plaintiff’s Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Docket No. 5) on December 5, 2019.
2. On December 16, 2019, the United States filed its First Amended Complaint for Injunctive Relief adding Defendant TGR Construction, Inc. as a defendant in the case (Docket No. 17).

¹ Attached hereto as Exhibit 1.

3. On September 10, 2020, the Court entered its Rule 16 Scheduling Order (Docket No. 54). In the Rule 16 Scheduling Order, the Court set May 7, 2021, as the deadline to make amendments to pleadings. Pursuant to the Court's Rule 16 Scheduling Order, the United States seeks leave to file its Second Amended Complaint for Injunctive Relief to update its facts and claims against the Defendants in this matter.

REQUEST FOR LEAVE OF COURT TO FILE SECOND AMENDED COMPLAINT

4. Since the United States filed its First Amended Complaint on December 16, 2019, construction of the bollard fence system has been completed along the banks of the Rio Grande River on land that was owned by Defendant Neuhaus & Sons, LLC. After the construction of the bollard fence system, Defendant Neuhaus & Sons, LLC. transferred the land on which the bollard fence system is constructed to Defendant TGR Construction, Inc. via special warranty deed. The agreement between Defendant Neuhaus & Sons, LLC and Defendant TGR Construction, Inc. contains a reversionary clause which has not been exercised by Defendant Neuhaus & Sons, LLC. Accordingly, at this time, it does not appear that Defendant Neuhaus & Sons, LLC. is a proper defendant in this matter and Defendant Neuhaus & Sons, LLC is not included in the attached Second Amended Complaint.²
5. Further, after the grading of the riverbank and construction of the bollard fence system, seasonal rains and storms caused severe erosion along the riverside of the bollard fence system extending all the way to the river. If not properly remediated and maintained, the riverbank of the United States will continue to lose land which could lead to a shift in the boundary of the United States and Mexico.

² The United States will file a motion to dismiss Defendant Neuhaus & Sons, LLC without prejudice pursuant to Rule 41(a)(2) F.R.C.P.

6. Finally, the United States alleges that hydraulic models submitted by the Fisher Defendants fail to adequately assess and demonstrate the impacts of the bollard fence system in a flood event. Accordingly, a hydraulic model was developed by the International Boundary and Water Commission which revealed an adverse deflection along a portion of the bollard fence system in violation of the standards USIBWC has set in implementing the 1970 treaty between the United States and Mexico.
7. Accordingly, the United States respectfully requests the Court grant leave so that the Second Amended Complaint for Injunctive Relief may be filed and entered on the Court's docket.

CERTIFICATE OF CONFERENCE

Undersigned counsel for the United States attempted to confer with Mark Courtois via email on May 6-7, 2021. As of this filing, Mr. Courtois has not indicated whether he is opposed to this motion or the attached Second Amended Complaint for Injunctive Relief and as such, it is assumed for purposes of this motion that the Fisher Defendants are opposed. Undersigned counsel for the United States conferred with Lance Kirby via email on May 6-7, 2021 and Defendant Neuhaus & Sons, LLC is not opposed to this motion.

PRAYER

The United States prays the Court grant its motion for leave to file its Second Amended Complaint to properly reflect its updated facts and claims.

Respectfully submitted,

JENNIFER B. LOWERY

Acting United States Attorney

Southern District of Texas

DANIEL DAVID HU

Chief, Civil Division

BY: *s/ E. Paxton Warner*

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Attorney for the United States of America

CERTIFICATE OF SERVICE

I, E. Paxton Warner, do hereby certify that on May 7, 2021, a copy of the foregoing was served via ECF and email to the following:

Mark Courtois
mjcourtois@fflp.com
Attorney for the Fisher Defendants

Lance Kirby
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Attorney for Neuhaus & Sons, LLC

By: *s/ E. Paxton Warner*
E. PAXTON WARNER
Assistant United States Attorney